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The King's Bench Power in Pennsylvania: A Unique Power That Provides Efficient Results

I. Introduction*

"The shadow of Rolf Larsen still haunts the Pennsylvania Supreme Court."¹ During the former justice's impeachment trial in 1994, two possible abuses by the Court of the King's Bench power² were presented to the Pennsylvania Legislature's Impeach-

* Author's note: In an effort to assist the reader in obtaining the Pennsylvania legislative documents cited in this comment, the Bluebook rules were supplemented with those citations of common usage within the Commonwealth of Pennsylvania.

1. *King's Bench Isn't Broke, Court is*, MORNING CALL (Allentown), Aug. 18, 1995, at A18. Rolf Larsen is a former Pennsylvania Supreme Court Justice who was found guilty on one of seven counts of misconduct by the Pennsylvania Senate in 1994. He was the first Pennsylvania judge convicted in an impeachment process since 1811. Larsen was permanently removed from the bench and banned from state public office for life. Only two other judges in Pennsylvania history have been convicted of wrongdoing and removed: Thomas Cooper, president judge of Northumberland, Luzerne and Lycoming counties in 1811; and Judge Alexander Addison in 1803. See Jack Sherzer, *Senate Convicts Larsen—Ex-Justice Guilty on 1 of 7 Charges*, PATRIOT-NEWS (Harrisburg), Oct. 5, 1994, at A1.

2. King's Bench, in essence, is a mechanism which allows the Pennsylvania Supreme Court to take complete jurisdiction over the proceedings and to decide a case of immediate public importance without the normal lower court proceedings. Thus, litigants who successfully invoke the King's Bench power receive a more expeditious resolution of their disputes. See *In re Ninth Statewide Investigating Grand Jury*, 88 M.D. Misc. Dkt. 1992, 67 (Report, Oct. 22, 1993) [hereinafter *Grand Jury Report*].

ment Trial Committee.³ Although the Attorney General investigated and found no violation of the law,⁴ the Legislature questioned the legitimacy of the supreme court's use of the power.⁵ Now, plagued by public disdain for the commonwealth's highest court,⁶ the Pennsylvania Legislature believes it is time to restrict, or possibly even repeal, this unique judicial authority that allows the supreme court immediately to assume jurisdiction of cases before lower courts.⁷

Immediately following the Larsen impeachment hearings, the Legislature, led by the House Judiciary Committee, drafted two bills,⁸ House Bill 10⁹ and House Bill 838.¹⁰ The originally stated purpose of the bills was to "put our appellate judiciary's house in order,"¹¹ "restore the constitutional balance between the judiciary and the legislature"¹² and "make the judiciary more accountable

3. See *In re: Impeachment Trial of Justice Rolf Larsen Before the Impeachment Trial Comm.*, Vol. X, pp. 2113-2359 (Pa. Aug. 24, 1994) [hereinafter *Impeachment Trial*] (testimony of the Hon. Stephen A. Zappala). See also discussion *infra* Part III.

4. See *Grand Jury Report*, *supra* note 2.

5. See *Public Hearing on Judicial Reform: House Bills 10 and 838 Before the House Judiciary Comm.*, York: Key Reporters, pp. 19-22 (Pa. Mar. 2, 1995) [hereinafter *March Hearing*] (statement of Rep. Jeffrey E. Piccola, Chairperson).

6. See *Public Hearing on King's Bench Authority of Pennsylvania Supreme Court Before the House Judiciary Comm.*, York: Key Reporters, pp. 4-6 (Pa. Aug. 3, 1995) [hereinafter *August Hearing*] (statement of Rep. Jeffrey E. Piccola, Chairperson); see also Emilie Lounsberry, *How Judges and Lawyers in Survey Rate Pa. Supreme Court Justices*, PHILA. INQUIRER, Jan. 15, 1995, at A1 (survey finding lawyers and judges who are highly familiar with Pennsylvania Supreme Court rate a majority of its justices as above average on the law, but give justices low marks on political independence). The survey was conducted to determine how the court is viewed within the state's legal community after two years of controversy over the conduct of Justice Rolf Larsen.

7. See Rep. Jeffrey E. Piccola, *Reigning in Court Necessary to Restore Balance*, PATRIOT-NEWS (Harrisburg), Sept. 15, 1995, at A15; see also *Judicious Agenda—Piccola Eyes Changes in Court Rules, Location While Reform Iron Remains Hot*, PATRIOT-NEWS (Harrisburg), Feb. 13, 1995, at A6.

8. The bills jointly provide for four major provisions: the elimination of the supreme court's King's Bench power, the creation of a new Judicial Council, the selection of the Chief Justice by the Governor, and the requirement that the seat be placed in Harrisburg. See *March Hearing*, *supra* note 5, at 8-9 (statement of Rep. Jeffrey E. Piccola).

9. House Bill No. 10, Printer's No. 1958 (Pa. 1995) [hereinafter HB 10] (regarding a proposed amendment to the Pennsylvania Constitution with respect to judicial reform).

10. House Bill No. 838, Printer's No. 1959 (Pa. 1995) [hereinafter HB 838] (implementing legislation to House Bill 10).

11. *Meeting, Judicial Reform Before the House Judiciary Comm.*, (Pa. May 23, 1995) (statement of Rep. Jeffrey E. Piccola, Chairperson).

12. *March Hearing*, *supra* note 5, at 7 (statement of Rep. Jeffrey E. Piccola, Chairperson).

to the clientele it ultimately serves, the citizens of Pennsylvania."¹³ These goals, however, are not met in the provision restricting, or eliminating, the King's Bench power.

The Legislature has admitted that, although it thinks that the Pennsylvania Supreme Court "invokes the King's Bench Jurisdiction in a haphazard and inscrutable way,"¹⁴ the legislative branch "has seen nothing which [sic] would lead [it] to believe that the supreme court has acted contrary to law."¹⁵ Nevertheless, the Legislature steadily continues to work toward a constitutional amendment that would eliminate or severely restrict King's Bench.¹⁶ If the amendment is adopted, Pennsylvania will lose a unique power that expedites the legal decision-making process.

The Pennsylvania House of Representatives conducted several hearings on the bills that revealed a variety of views on the need for and use of the King's Bench power.¹⁷ Through the hearings, the House discovered that King's Bench is a rarely used power. However, that power is highly effective for matters of concern to the commonwealth.¹⁸ Consequently, many in the legal profession hesitate to remove this power and urge other reforms, such as merit selection of judges,¹⁹ to restore confidence in Pennsylvania's judicial system.

This comment argues that removal of the historical King's Bench power will leave a void in Pennsylvania's judicial branch. It explores the existing statute and the problems with the law, provides a synopsis of the movement behind the removal of the power, and reviews the substance of the originally introduced bills.

13. *Id.*

14. *August Hearing*, *supra* note 6, at 5 (statement of Rep. Jeffrey E. Piccola, Chairperson).

15. *Id.*

16. *See infra* note 85 and accompanying text (reviewing the history of the originally introduced House bills and the subsequently introduced Senate bills). On February 28, 1997, Senator Piccola along with six other senators introduced legislation that "establish[es] the Unified Judiciary Commission to study reform of the judiciary." Senate Bill No. 578, Printer's No. 607 (Pa. 1997) (Commission's duties to include study of Pennsylvania's King's Bench power).

17. The hearings were held March 2, 1995 and August 3, 1995. A committee meeting was held on May 23, 1995. *See supra* notes 5, 6, 11.

18. *See August Hearing*, *supra* note 6, at 10-11 (testimony of Zygmunt Pines, Chief Counsel, Administrative Office of Pennsylvania Courts).

19. *See March Hearing*, *supra* note 5, at 96 (testimony of Hon. Robert L. Byer, retired judge, Pa. Commw. Ct., representing Judicature Society); *see also* Rich Kirkpatrick, *Merit Selection Long Overdue, Judge Tells House Subcommittee*, AP POLITICAL SERVICE, Aug. 30, 1995, available in 1995 WL 6739629.

The problems with the bills as written, including the possible impact such a removal could have on the future of the court system in Pennsylvania, are also discussed. In addition, this comment looks at other states and their appeal processes and recommends procedures the Pennsylvania Supreme Court may implement in order to provide a more accountable judicial system.

II. Existing Law and Its Problems

The King's Bench power²⁰ was granted to the Pennsylvania Supreme Court in the Act of 1722.²¹ Historically,²² this power was given to the supreme court to exercise the authority of the King's Bench jurisdiction—a jurisdiction exercised by the judges of the King's Bench, Common Pleas, and Exchequer at Westminster.²³ This power included the right to supervise and manage the other courts.²⁴

Since the 1722 Act, the Legislature has added and deleted many judicial provisions. Among the changes are the number of justices who sit on the bench, their qualifications, and their tenure.²⁵ Throughout the commonwealth's 275 year history, however, the King's Bench power has remained.²⁶ At the 1968 Pennsylvania Constitutional Convention, some delegates questioned whether the power should be removed.²⁷ Nevertheless, King's

20. The term "King's Bench" is a misnomer because Pennsylvania does not have a King nor does the state have the three principal English courts of Westminster. For this reason, many call this power "plenary" or "extraordinary" jurisdiction. *August Hearing, supra* note 6, at 8-9 (testimony of Zygmunt Pines).

21. The justices shall "exercise the jurisdiction and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the Justices of the Court of King's Bench, Common Pleas, and Exchequer, at Westminster, or any of them, may or can do." 1 SMITH LAWS 140 (1810).

The history of the power, however, dates back to the English common law tradition in equity of the 1300's. The power allowed the second highest court in all of England to submit before it any proceedings stemming from any lower court. *See March Hearing, supra* note 5, at 14 (testimony of Paul Stevens, President, Pennsylvania Bar Association).

22. *See* Bernard F. Scherer, *The Supreme Court of PA and the Origins of King's Bench Power*, 32 DUQ. L. REV. 525 (1994) (providing an in-depth look at the historical view of this power).

23. *See* 1 SMITH LAWS 140 (1810).

24. *See August Hearing, supra* note 6, at 9 (testimony of Zygmunt Pines).

25. *See* THE PENNSYLVANIA MANUAL 5-4 (Dep't of Gen. Servs. ed., 1995).

26. *See id.*

27. *See* DIV. OF DOCUMENTS, DEP'T OF PROPERTY & SUPPLIES, DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-1968, Vol. II, at 841-42 (1969) [hereinafter DEBATES].

Bench remained because the delegates believed that the power is inherent and, therefore, cannot be removed.²⁸

Today, King's Bench can be found in both the Pennsylvania Constitution and statutory law. Sections 2(a),²⁹ 10(a),³⁰ and 10(c)³¹ of article V of the constitution designate the supreme court as the highest court of the Commonwealth of Pennsylvania with power over all other courts. The statutory power for King's Bench, or plenary jurisdiction, can be found in title 42 of the Pennsylvania

28. At the 1968 Constitutional Convention, Delegate Robert Woodside referred to the King's Bench powers as an inherent jurisdiction, "powers, which, in effect, are the Commonwealth powers" *August Hearing, supra* note 6, at 10 (testimony of Zygmunt Pines). See also, *DEBATES, supra* note 27, at 841-42.

29. Article V, section 2(a) of the Pennsylvania Constitution states: "The Supreme Court shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth." PA. CONST. art. V, § 2(a).

30. Article V, section 10(a) states: "The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate." PA. CONST. art. V, § 10(a).

31. Article V, section 10(c) states:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation of repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

PA. CONST. art. V, § 10(c).

Consolidated Statutes Annotated, sections 502³² and 726.³³ Case law has helped to define the King's Bench power even further.³⁴

Despite the Legislature's assertion that this power is used far too often, from 1979 to 1994 the supreme court reviewed only ninety-seven³⁵ cases under King's Bench, plenary or extraordinary relief.³⁶ The recent case of *Thermal Pure v. DER*³⁷ and Justice Larsen's accusations of Justice Zappala abusing the power,³⁸ however, have caused some legislators and residents to question whether the supreme court should have this power.³⁹ Yet, before

32. Section 502, General powers of supreme court, states:

The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722. The Supreme Court shall also have and exercise the following powers:

(1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law.

(2) The powers vested in it by statutes, including the provisions of this title.

42 PA. CONS. STAT. ANN. § 502 (West 1981).

33. Section 726, Extraordinary jurisdiction, states:

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice be done.

42 PA. CONS. STAT. ANN. § 726 (West 1981).

34. See discussion *infra* Part IV.

35. The court has approximately 3,000 cases before it each year, which includes allocatur cases. See *August Hearing*, *supra* note 6, at 12, 30 (testimony of Zygmunt Pines).

36. The following categorization of cases was accepted and decided under plenary jurisdiction from 1979 to 1994:

Civil Cases:	Election cases: 5
	Judicial Election cases: 12
	Labor Cases: 6
	Government related cases: 11
	Other: 18
Criminal Cases:	Grand Jury cases: 2
	Other: 29
	Media related cases: 4
Judicial Admin.:	Funding cases: 4
	Other: 6

See *id.*

37. 63 E.D. Misc. Dkt. 1995 (Pa.); see also *Chester Residents Concerned for Quality Living v. DER*, 668 A.2d 110 (Pa. 1995). For a discussion of the background on this case, see generally *infra* Part III.

38. See *Impeachment Trial*, *supra* note 3.

39. See *August Hearing*, *supra* note 6, at 5-6.

any final decisions are made to remove the King's Bench power, it is necessary to understand how the judicial and legislative branches, as well as the vocal opponents and proponents, view the power.

A. *Supreme Court's View of the Power*

Justice Zappala explained the modern day understanding of the jurisdiction of King's Bench during the Larsen hearings. He described the jurisdiction as "broad" and stated that the power was designed to "resolve the issue and dispose of it."⁴⁰ Case law endorses Justice Zappala's beliefs and further shows that the supreme court believes King's Bench is based in the Pennsylvania Constitution.⁴¹

The court has stated that Pennsylvania's Constitution grants power to the supreme court "to prescribe general rules governing practice procedure and the conduct of all courts."⁴² Furthermore, the court has interpreted section 10(c) to mean that:

40. *Impeachment Trial*, *supra* note 3. Justice Zappala stated:

Well, King's Bench jurisdiction, there's two, essentially. There's King's Bench, and you also have plenary, both by statute. King's Bench is regarded more as the much broader, and it came from the old common law days where you are the king's court and you could do no wrong and whatever the king wants you to do, you go and do it. It's almost an absolute power that the court has in order to protect, quote, the fiefdom—or the crown. And it's never been altered or changed, either by Constitution or statute. Interestingly, they then supplemented that with the plenary powers of the court to reach in at any given time because of necessity, and so forth, so that a petitioner could come by either way, King's Bench or by plenary jurisdiction. Both of them are not—are rarely used except in extraordinary times. But both give the court the ability, if they deem it appropriate, to move where necessary to cure something which has been caused by some wrong. That's as simple as I can put it.

Q. Is there any major difference between a King's Bench case or a plenary jurisdiction case?

A. There essentially, with a King's Bench says you can do basically almost anything, and that's pretty wild. Whereas plenary, you have to take it on the position that there is a case or controversy at issue, so that there is something pending within your court system, one more or less has to have an overlay of what we call jurisdiction, there has to be something there for you to reach down and take it. Whereas the King's Bench says just go grab what you want, bring it up, do what you have to do, resolve the issue and dispose of it.

Impeachment Trial, *supra* note 3, at 2163-64 (testimony of Hon. Stephen A. Zappala).

41. See *In re* 42 PA. C.S. § 1703, 394 A.2d 444, 447 (Pa. 1978), *leave to file petition for mandamus denied sub nom.* Kubert v. Supreme Ct. of Commonwealth of Pa., 440 U.S. 905 (1979).

42. *Id.* at 447 (citing PA. CONST. art. V, § 10(c)).

All laws shall be suspended to the extent that they are inconsistent with rules prescribed under [this] provision The jurisdiction of the King's Bench encompasses the inherent power of removing by certiorari the record and proceedings of any criminal case from the inferior courts at any stage of the proceedings.⁴³

Due to the court's strong words, legal scholars and practicing attorneys believe that if the Legislature enacts legislation removing or restricting King's Bench through the Judicial Code without a constitutional amendment, the supreme court will declare the legislation unconstitutional.⁴⁴

Furthermore, any constitutional amendment will need to be worded strongly, because the court has stressed that the King's Bench power is transcendent. For example, before the 1968 constitutional amendments were enacted, the court stated that:

Inherent in the Court of King's Bench was the power of general superintendency over inferior tribunals, a power which was of an ancient inception and recognized by the common law from its very beginning. The jurisdiction of this court [of King's Bench] is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceeding to be determined here, or prohibit their progress below.⁴⁵

Thus, if the Legislature fails to express clearly its intention of removing this power from the judiciary system, then the supreme court may indeed return to the pre-1968 interpretation of King's Bench and continue to invoke the power when it believes necessary.

The court also views the power as an efficient use of judicial resources. It has found that "[i]n order to conserve judicial resources, speed the criminal trial in this case, and provide guidance for the lower courts as to a question that is likely to recur, [it will] assume jurisdiction of the case pursuant to [its] King's Bench Powers."⁴⁶ The supreme court has used the power to

43. *Commonwealth v. Onada*, 103 A.2d 90, 91 (Pa. 1954).

44. See *August Hearing*, *supra* note 6.

45. *In re Bell*, 152 A.2d 731, 734 (Pa. 1959) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *42).

46. *Commonwealth v. Lang*, 537 A.2d 1361, 1363-64 n.1 (Pa. 1988).

protect innocent bystanders who are harmed by parties in litigation.⁴⁷ It has stated that:

[T]he courts cannot and will not sit idly by while others who are non-participants in the dispute essentially suffer the greatest harm. In the wisdom of the framers of the Pennsylvania Constitution, such incidents were anticipated so that the framers provided that where a legal injury is sustained, there shall and will always be access to the courts of this Commonwealth.⁴⁸

Despite such a broad interpretation of the King's Bench power, the court rarely exercises its authority for plenary jurisdiction.⁴⁹ In *Carpentertown Coal & Coke v. Laird*, the court stated:

The writ of prohibition is one which, like all other prerogative writs, is to be used only with great caution and forbearance and as an extraordinary remedy in cases of extreme necessity, to secure order and regularity in judicial proceedings if none of the ordinary remedies provided by law is applicable or adequate to afford relief.⁵⁰

Indeed, several times the court has stressed the very limited availability of this jurisdiction.⁵¹

B. The Legislature's View of the Power

The Legislature's and the public's perception of King's Bench is that it is too vague, gives too much power to the judiciary, and is inconsistent. The Legislature also is concerned with the court's expansive power over other branches of government.⁵² During the House Judiciary Committee hearings, Chairman Piccola stated:

The more the committee examines the operations of the Supreme Court and its King's Bench power, the more I am reminded of a street gang maintaining little or no rules. Most troubling to me is how the Supreme Court operates in almost lightning-strike fashion, when [sic] haphazard procedures that undermine the credibility of the judiciary.⁵³

47. See discussion *infra* Part IV.C.

48. *Masloff v. Port Auth. of Allegheny County*, 613 A.2d 1186, 1190 (Pa. 1992).

49. See *supra* note 36.

50. *Carpentertown Coal & Coke v. Laird*, 61 A.2d 426, 430 (Pa. 1948).

51. See *id.*

52. See generally *March Hearing*, *supra* note 5; *August Hearing*, *supra* note 6.

53. *Inside the Capitol: Lawyer's Beef with Reform No Mystery*, PATRIOT-NEWS (Harrisburg), Aug. 10, 1995, at B4 (statement of Rep. Jeffrey E. Piccola).

The recent case of *Thermal Pure v. DER*⁵⁴ serves as the perfect platform for the House members to advocate a need for removal of this power.⁵⁵

At the August Hearing before the House Judiciary Committee, a resident who lives near the hazardous treatment plant testified that when the case went before the supreme court for argument under King's Bench, it was as if they, the residents, "had walked in[to] the lions den."⁵⁶ The testimony was so compelling that it was difficult, if not impossible, for legislators not to lend a sympathetic ear to this constituent.⁵⁷ Because of the need to respond to the constituency in a highly political matter, legislators are having a difficult time deciphering what this power is all about and whether they need to limit it.⁵⁸

C. *The Legal Profession's View of the Power*

Despite court rules that outline when and how extraordinary relief is available, the legal profession too is perplexed about how this power works and how a petition for relief is granted.⁵⁹ Lawyers want the power to remain but are in disagreement as to how to curtail any potential abuses.⁶⁰ Some believe the Legislature should push for merit selection of judges.⁶¹ Others believe the Legislature can limit any and all powers of the Pennsylvania

54. 63 E.D. Misc. Dkt. 1995 (Pa.). See also *August Hearing*, *supra* note 6; Chester Residents Concerned for Quality Living v. DER, 668 A.2d 110 (Pa. 1995).

55. See *August Hearing*, *supra* note 6 (testimony of Rep. Jeffrey E. Piccola); *Pennsylvania Lawmakers Trash Court After Touring Thermal Pure Community*, MED. WASTE NEWS, Sept. 19, 1995 at 7. For background information on *Thermal Pure v. DER*, see discussion *infra* Part III.

56. *August Hearing*, *supra* note 6, at 43 (testimony of Zulene Mayfield, Chair, Chester Residents Concerned for Quality Living).

57. See *August Hearing*, *supra* note 6, at 53 (comments of Rep. James).

58. See *id.* at 92 (comments of Rep. Manderino).

59. See *id.* at 64 (testimony of Jerome Balter, Esq.).

60. In an adversarial system what is considered an abuse for one side is considered a welcome relief for the other side.

61. See Bridget E. Montgomery, *Partisan Elections: The Albatross of Pennsylvania's Judiciary*, 98 DICK. L. REV. 1 (1993); *March Hearing*, *supra* note 5, at 185 (testimony of Barry L. Kauffman, Executive Director, Pa. Common Cause). This reform, however, does not have enough support in the Pennsylvania Legislature to pass. In a recent Associated Press survey of Pennsylvania lawmakers, fifty-eight percent opposed replacing judicial elections with merit selection. Thirty-five percent supported merit selection. See Pamela Sampson, *Survey Shows Lawmakers Favor Court Reforms in Wake of Larsen Trial*, AP POLITICAL SERVICE, Feb. 16, 1995, available in 1995 WL 6714669.

courts.⁶² Yet others believe that a hybrid approach may be taken by limiting King's Bench to cases that are in the Pennsylvania courts.⁶³ This hybrid approach would prevent the supreme court from hearing a case that was before an administrative agency but had not yet exhausted the appellate procedures within that agency.⁶⁴

III. The Call for a New Act

Several events happened within a short amount of time that provoked the Legislature to introduce amendments eliminating the King's Bench power from the supreme court.⁶⁵ In August 1994, Justice Rolf Larsen accused his colleague, Justice Zappala, of favoritism and failing to follow the proper procedure for review.⁶⁶ The Impeachment Committee, intrigued by Justice Larsen's accusations, questioned Justice Zappala concerning the court's use of the King's Bench or plenary jurisdiction in *Masloff v. Port Authority of Allegheny County*⁶⁷ and *Philadelphia v. Pennsylvania Labor Relations Board*.⁶⁸ The Committee focused on the possibility that Justice Zappala was participating in ex parte proceedings to aid the city of Pittsburgh, as the city's administration had personal contacts within the court.⁶⁹ Justice Zappala explained to the Committee the procedure his chamber uses when accepting a case under King's Bench and plenary jurisdiction; he assured no favoritism was involved.⁷⁰ While the Committee appeared to accept Justice Zappala's rendition, the senators, representatives,

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62. See *August Hearing*, *supra* note 6, at 141 (testimony of Bruce Ledewitz, Professor of Law, Duquesne Univ.).

63. See *March Hearing*, *supra* note 5, at 28 (testimony of Jon LaFaver, Adjunct Professor, The Dickinson School of Law).

64. See *id.*

65. The other provisions in the bills are not new ideas. The Beck and Pomeroy Commissions made many of these recommendations in the 1980s. See PHYLLIS W. BECK, COMMITTEE TO STUDY PENNSYLVANIA'S UNIFIED JUDICIAL SYSTEM, PENNSYLVANIA'S UNIFIED JUDICIAL SYSTEM: AN ANALYSIS WITH RECOMMENDATIONS (1988); THOMAS W. POMEROY, JR., COMMITTEE TO STUDY PENNSYLVANIA'S UNIFIED JUDICIAL SYSTEM, PENNSYLVANIA'S UNIFIED JUDICIAL SYSTEM: AN ANALYSIS WITH RECOMMENDATIONS (1982).

66. See *Impeachment Trial*, *supra* note 3, at 274-75, 2183-98, 2259-74.

67. 613 A.2d 1186 (Pa. 1992).

68. 614 A.2d 213 (Pa. 1992).

69. See *Impeachment Trial*, *supra* note 3, at 2166-86.

70. See *id.* at 2165-67.

and the public noted these acts to review when the dust settled from the impeachment hearing.⁷¹

Meanwhile, the legal community was induced to question how well the supreme court performs its duties in several law review articles written by Professor Bruce Ledewitz⁷² and Judge Bernard Scherer.⁷³ Professor Ledewitz's article examined several areas where the supreme court has over-exerted itself or where the court failed to carry out its responsibilities.⁷⁴ Many of his conclusions were incorporated into House Bills 10 and 838. Judge Scherer wrote an article specifically on the history of King's Bench in Pennsylvania and concluded that the supreme court has exceeded the historical power of King's Bench.⁷⁵

Much of this debate would have escaped the public's interest if it were not for two recent cases that came before the supreme court under its plenary jurisdiction. In *Thermal Pure v. DER*,⁷⁶ the Pennsylvania Supreme Court agreed to hear the case under plenary jurisdiction and temporarily allowed a hazardous waste company to continue operations until the court handed down a decision.⁷⁷ Residents, who believed the company was operating an unsafe and unhealthy waste treatment plant in their community, were furious.⁷⁸ When a member of the community group testified before the House Judiciary Committee, the House members seized upon this case as a prime example of an abuse of power by the supreme court.⁷⁹ It is the only case, however, that the members appear to focus on in the debate over whether to remove this



71. See *March Hearing*, *supra* note 5, at 4-7.

72. See Bruce Ledewitz, *What's Really Wrong with the Supreme Court of Pennsylvania*, 32 DUQ. L. REV. 409 (1994). Bruce S. Ledewitz is a Professor of Law at Duquesne University. He appeared before the House Judiciary Committee twice in 1995 to testify about judicial reform. See *March Hearing*, *supra* note 5, at 118; *August Hearing*, *supra* note 6, at 141.

73. See Bernard F. Scherer, *The Supreme Court of Pennsylvania and the Origins of King's Bench Power*, 32 DUQ. L. REV. 525 (1994). Judge Scherer currently sits on the Common Pleas Court of Westmoreland County and was nominated by Governor Casey on September 9, 1994 to fill the vacant slot of Justice Larsen on the supreme court until January 1996. His confirmation was never affirmed in the Senate. See *Successor Chosen*, *READING TIMES* (Pa.), Sept. 10, 1994, at B4.

74. See Ledewitz, *supra* note 72.

75. See Scherer, *supra* note 73.

76. 63 E.D. Misc. Dkt. 1995 (Pa); see also *Chester Residents Concerned for Quality Living v. DER*, 668 A.2d 110 (Pa. 1995).

77. See *Chester Residents*, 668 A.2d at 111.

78. See *August Hearing*, *supra* note 6, at 42-64 (testimony of Zulene Mayfield).

79. See *id.*

power. The other case, *School District of Wilkinsburg v. Wilkinsburg Education Association*,⁸⁰ has been decided by the Pennsylvania Supreme Court⁸¹ and may add to this debate.⁸²

Due to the above-stated events, the Pennsylvania House of Representatives and Senate have introduced several bills aimed at cleaning up the judicial branch. Revised⁸³ House Bill 10, House Bill 838, and Senate Bill 334⁸⁴ have been re-introduced, and are currently being reviewed and debated before the Legislature.⁸⁵ The legislation, if enacted as originally introduced, would repeal the

80. 667 A.2d 5 (Pa. 1995) (No. 55 W.D. Appeal Docket 1995); see *infra* notes 115-24 and accompanying text.

81. The decision was handed down on October 27, 1995. See *School Dist. of Wilkinsburg*, 667 A.2d at 5.

82. See discussion *infra* Part IV.C.

83. Although the House was prepared to vote on the bills, its agenda was complicated when the prime sponsor of the bills, Jeffrey E. Piccola, won a special election for the 15th Senatorial District. See PATRIOT-NEWS (Harrisburg), Nov. 3, 1996. As a result of this election, the bills were tabled. On March 20, 1996, Senator Piccola re-introduced the bills in the Senate as Senate Bill 1452 through Senate Bill 1458. On November 30, 1996, all legislation that did not pass during that legislative session died. On February 28, 1997, Senator Piccola along with six other senators introduced Senate Bill 578, an act "establishing the United Judiciary Commission to study reform of the judiciary." Senate Bill No. 578, Printer's No. 607 (Pa. 1997). The Commission is charged with the responsibility of studying the King's Bench powers of the supreme court and preparing a report by June 30, 1998. See *id.*

84. See *infra* note 88 and accompanying text. Senate Bill 334 also deals with judicial reform; however, its language is not as extensive as House Bills 10 and 838. Therefore, Senate Bill 334 is not considered to be the bill of choice for judicial reform.

85. House Bills 10 and 838 were introduced on February 14, 1995 by Rep. Piccola, Chairperson of Judiciary Committee. The history of the bills is as follows:

- Referred to House Judiciary Committee - Feb. 14, 1995
- House Judiciary Committee Public Hearing - Mar. 2, 1995
- Reported as amended - May 23, 1995
- First consideration - May 23, 1995
- Laid on the table - May 23, 1995
- Removed from the table - June 27, 1995
- Re-referred to Appropriations - June 27, 1995
- House Judiciary Committee Public Hearing - Aug. 3, 1995
- 86 co-sponsors

See 6 COMBINED HISTORY OF SENATE AND HOUSE BILLS, 179th Reg. Sess. (1995-1996) (July 20, 1995).

It was anticipated that the bills would be voted on during the 1995-96 session. Telephone Interview with Karen L. Dalton, Counsel, House Judiciary Committee (Sept. 15, 1995). However, Jeffrey E. Piccola's victory in the 15th Senatorial District prevented any further action. See *supra* note 83.

If approved, the constitutional amendment must be approved again next session. From there, the issue will go before the residents of the commonwealth for a referendum vote the following election season. See PA. CONST. art. XI, § 1.

Act of 1722 and empower the Legislature to determine the types of cases the supreme court may hear under plenary jurisdiction.⁸⁶ The result could mean that the Legislature could prevent the Pennsylvania Supreme Court from hearing certain cases.⁸⁷

IV. Problems With the Proposed New Act

If the Legislature ultimately enacts the legislation as originally introduced,⁸⁸ several areas would remain unresolved. The main

86. See *infra* note 88 (language of bill).

87. The majority of scholars agree that passage of House Bill 10 without House Bill 838 would allow the supreme court to declare the legislation unconstitutional as an intrusion into the separation of powers. See *March Hearing*, *supra* note 5, at 122 (testimony of Bruce S. Ledewitz).

There is judicial language suggesting that the King's Bench power is inherent in the Court. Therefore, a constitutional amendment of the sort proposed may be needed But whatever you do, you have to amend the Constitution and not rely on the legislature's jurisdictional powers because you don't know what this Court will say about their [sic] inherent power.

Id. at 130.

88. House Bill 10 reads as follows:

Proposing amendment to the Constitution of the Commonwealth of Pennsylvania, establishing the Judicial Council of Pennsylvania and providing for its powers and duties; rescinding the power of the Supreme Court to suspend statutes; providing for the selection of the Chief Justice by the Governor and for the budgetary affairs of the unified judicial system.

The General Assembly of the Commonwealth of Pennsylvania hereby resolves as follows:

Section 1. The following amendments to the Constitution of Pennsylvania are proposed in accordance with Article XI:

(1) That sections 1, 2, 10, and ~~13~~ 16 of Article V be amended to read:

§ 2. Supreme Court.

(a) The Supreme Court [(a)] shall be the highest court of the Commonwealth [and in this court shall be reposed the supreme judicial power of the Commonwealth;

(b)]. It shall consist of seven justices, one of whom shall be the Chief Justice[;] and

[(c)] shall have such jurisdiction as shall be provided by law.

(d) ~~The~~ EXCEPT AS PROVIDED BY STATUTE, THE Supreme Court shall not have King's Bench power.

HB 10, *supra* note 9.

House Bill 838 reads as follows:

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for the Judicial Council of Pennsylvania.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 4. Sections 501 and 502 of Title 42 are amended to read:

§ 501. Supreme Court.

(b) *Certain powers rescinded.* — ~~The~~ EXCEPT AS PROVIDED BY STATUTE, THE Supreme Court shall not have King's Bench power.

problem with the original drafts is that the bills do not clearly define the responsibilities of the court. House Bill 838 requires the Legislature to provide a list of areas where the supreme court can exercise the King's Bench power.⁸⁹ However, the original legislation provides no such list, which means that the power cannot be used at all, effectively destroying King's Bench. Even if an amendment is introduced and a laundry list is provided, a case is certain to fall between the cracks and elude consideration.⁹⁰

Additionally, the original legislation does not provide a time in which the supreme court must hand down a decision in the stipulated cases. House Bill 838 does not allow the supreme court to intercede immediately when the lower courts need assistance in interpreting legislation; following the regular appeals process will mean delays and inconsistencies for citizens of the commonwealth. Furthermore, House Bill 838 does not afford sufficient guidance to those permitted to petition for the use of the power. Perhaps the most troubling aspect of the legislation as originally introduced, however, is that it does not fulfill one of the original goals—the restoration of the public's faith in the Pennsylvania judicial system.

§ 502. General powers of Supreme Court.

The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania [, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722. The Supreme Court shall also have and exercise the following powers:

(1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law.

(2) The] and powers vested in it by statute, including the provisions of this title.

HB 838, *supra* note 10.

89. See HB 838, *supra* note 10, § 501(b).

90. Incidentally, delegates at the 1968 Pennsylvania Constitutional Convention discussed why listing all the powers of the King's Bench was a bad idea. Namely, no one was capable of doing it! Delegate Woodside commented:

I doubt whether any justice of the Supreme Court or any lawyer in Pennsylvania could sit down and be sure that he has accurately spelled out in complete detail all of the powers of the King's Bench and all of the legislative powers and all of the old constitutional powers that now exist in the Supreme Court. We [the Constitutional Judicial Committee] did not feel capable of doing it. I do not think anybody is capable of doing it, and that is why we did not do it.

DEBATES, *supra* note 27, at 844.

In fact, it could have the opposite effect, preventing access to Pennsylvania's highest court when most necessary.

This power has been used for many valid purposes and truly acts as "a safety valve to protect the public."⁹¹ Without this power, the public interest would suffer in many ways. A number of examples will illustrate how this power has helped Pennsylvania citizens in every walk of life.

A. Voting Rights Not Protected

Without the supreme court's ability to hear cases under plenary jurisdiction, voting rights could be frustrated at election time by either delay or confusion. For example, in 1990, Pennsylvania's congressional seats were reduced from twenty-three to twenty-one due to the decline in population as reported by the United States Census Bureau.⁹² This reduction required the commonwealth to remap its congressional districts.⁹³ In 1992, when the period for circulating the nomination petitions had already begun, the Pennsylvania Commonwealth Court received the reapportionment suit.⁹⁴

The normal course of litigation⁹⁵ would have made a timely congressional primary impossible.⁹⁶ The Pennsylvania Supreme Court came to the Pennsylvania voters' rescue, however, by taking immediate jurisdiction on February 13, 1992. The supreme court designated the commonwealth court to act as hearing master, to receive evidence, and to recommend the twenty-one new districts.⁹⁷ Eleven days later, on February 24, 1992, the commonwealth court filed a redistricting plan. The supreme court, after a scheduled argument, adopted the plan on March 26, 1992.⁹⁸ This allowed the primary election to continue in almost normal fashion. Other elections, both primaries and fall elections, have been

91. *August Hearing*, *supra* note 6, at 17, 109.

92. *See Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992), *cert. denied*, 506 U.S. 828 (1992).

93. *See id.* at 205.

94. *See id.*

95. The normal litigation process would be: trial in the commonwealth court, post-trial motions, briefing, argument, decision in that court, appeal, briefing of the appeal and argument.

96. The last day to file nomination petitions for the May 1992 primary election was February 18, 1992. *See Mellow*, 607 A.2d at 205.

97. *See id.*

98. *See id.*

reviewed by the supreme court in a timely fashion to insure that the public has adequate representation at all times.⁹⁹

B. Public Projects Would Be Lost

In the longest preliminary injunction hearing in the commonwealth's history, a group sued to enjoin the Early Action Program of the Allegheny County Port Authority, which involved a proposed express busway and a rapid "Skybus" transit system.¹⁰⁰ The trial court agreed with the dissident group and granted the injunction.¹⁰¹ Because of this decision, the county was to lose proffered federal subsidy money to another state.¹⁰² The supreme court accepted the case under plenary jurisdiction, thereby omitting the commonwealth court's review.¹⁰³ Within a few months, the supreme court vacated the injunction and allowed the transit system to be built.¹⁰⁴

C. Health, Safety & Welfare of Pennsylvanians Would Not Be Properly Attended

One of the cases on which the Larsen Impeachment hearings focused was *Masloff v. Port Authority of Allegheny County*.¹⁰⁵ There, the city had reached an impasse with the workers' union¹⁰⁶ and sued in equity to enjoin the strike.¹⁰⁷ Simultaneously, the city filed a Petition for Extraordinary Relief with the supreme court under title 42, section 726 of Pennsylvania Consolidated Statutes Annotated.¹⁰⁸ The court assumed jurisdiction and remanded the matter to commonwealth court for expedited disposition.¹⁰⁹

The strike had caused a clear and present danger to citizens of the Pittsburgh area.¹¹⁰ Testimony indicated that the strike had a

99. See *Thiemann v. Allen*, 402 A.2d 1348 (Pa. 1979), *overruled sub nom.* *Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983); *McCabe v. Lehrer*, 439 A.2d 1147 (Pa. 1981).

100. See *Flaherty v. Allegheny County Port Auth.*, 299 A.2d 613, 616 (Pa. 1973).

101. See *id.* at 615.

102. See *id.* at 618.

103. See *id.* at 615-16.

104. See *id.* at 613.

105. 613 A.2d 1186 (Pa. 1992).

106. Some 2,700 individual employees of PAT comprised the union, Local 85. See *id.* at 1187.

107. See *id.*

108. See *id.* at 1188.

109. See *id.*

110. See *Masloff*, 613 A.2d at 1188.

far-reaching effect upon the commercial, academic, medical, and social institutions of western Pennsylvania.¹¹¹ For example, patients were unable to get to the appropriate medical facilities for treatment.¹¹² Evidence established that:

Emergency medical services were delayed in attempts to reach citizens in need. Citizens [were] endangering their safety by walking along public roads to get to work because other modes of transportation [were] unavailable. Residents [had] been forced to find alternate living accommodations with friends or family because of the inaccessibility to work, school or day care.¹¹³

The supreme court permanently enjoined the work stoppage and the city returned to normal while the parties resolved the underlying issues through the courts.¹¹⁴

More recently, in *School District of Wilkinsburg v. Wilkinsburg Education Association*,¹¹⁵ the supreme court accepted a petition under plenary jurisdiction to determine the legality of contracting with a for-profit entity to run a school.¹¹⁶ The parties had tried to work out their differences in common pleas court; however, the beginning of the school year was quickly approaching.¹¹⁷ Judge Freedman of the Court of Common Pleas of Allegheny County enjoined the school board's decision to hire a private contractor without a hearing.¹¹⁸ Commonwealth court affirmed the lower court ruling¹¹⁹ and the school board filed a petition for the supreme court to accept the petition under plenary jurisdiction.¹²⁰ The lower court continued to hold the school board in contempt for implementing the program it had enjoined.¹²¹ Without the supreme court hearing this issue, school would not

111. *See id.*

112. *See id.* at 1191.

113. *Id.*

114. *See id.* at 1192.

115. No. 102 W.D. Misc. Dkt 1995 (Pa.).

116. *See id.*

117. *See id.*

118. *See School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n*, No. GD95-05174, Civil Division (Pa. Ct. of C.P. of Allegheny County).

119. *See School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n*, 661 A.2d 947 (Pa. Commw. Ct. 1995)(No. 1032 C.D. 1995).

120. *See School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n*, No. 98 W.D. Misc. Dkt. 1995 (Pa.).

121. *See School Dist. of Wilkinsburg*, No. GD95-05174.

have started on time.¹²² The court ultimately heard both the contempt order and the legal issue under plenary jurisdiction.¹²³ Because the supreme court assumed jurisdiction of this case, students began the school year under private contractors while the legal issues were defined in court.¹²⁴

D. Inconsistent Interpretation of Newly Enacted Legislation Would Result

The supreme court has used the King's Bench power to resolve speedily any unconscionable or inconsistent provisions in newly enacted legislation. For example, in *Mattos v. Thompson*,¹²⁵ the supreme court assumed plenary jurisdiction to decide the constitutionality of a section of the Health Care Services Malpractice Act.¹²⁶ This act gave health care arbitration panels original exclusive jurisdiction over medical malpractice claims.¹²⁷ The supreme court found the delays in processing claims proscribed under the Act oppressive¹²⁸ and impermissibly infringed on a person's constitutional right to a jury.¹²⁹ The delays were found to be unconscionable, to rip the fabric of public confidence in the efficiency and effectiveness of our judicial system irreparably, and incapable of achieving the stated purpose of the legislative scheme.¹³⁰

In *Commonwealth v. Lutz*,¹³¹ plenary power was used to resolve nine lower courts' views over the legislative enactment of the Accelerated Rehabilitative Disposition ("ARD") created by the

122. See Brief for petitioner at 10, School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, No. 98 W.D. Misc. Dkt. 1995 (Pa.).

123. See School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5 (Pa. 1995).

124. See *Landmark Ruling Allows Turner Initiative To Proceed*, PR NEWswire, Aug. 25, 1995, available in WESTLAW, News Library, ALLNEWSPLUS File.

125. 421 A.2d 190 (Pa. 1980).

126. PA. STAT. ANN. tit. 40, § 1301.101 (West 1992).

127. See *Mattos*, 421 A.2d at 191.

128. Between April 6, 1976 and December 31, 1979, a total of 2,909 claims were filed with the Administrator under the Act. Of those 2,909 claims, 134 cases were given a certificate of readiness; of those 134, 14 were tried before an arbitration panel, 23 were settled during panel selection, one was continued by order of commonwealth court and 96 had no final disposition. The amount in controversy in many of these cases exceeded \$10,000. See *id.* at 194.

129. See *id.* at 196.

130. See *id.* at 195.

131. 495 A.2d 928 (Pa. 1985).

Motor Vehicle Code for drunk driving cases.¹³² Lower courts were unsure how to interpret the newly enacted statute and attorneys for the commonwealth refused to allow the defendants' admissions into the ARD programs.¹³³ The Pennsylvania Supreme Court ultimately held that the ARD program was a privilege which the Attorney General had to control—not the defendants.¹³⁴

In *Bacchetta v. Bacchetta*¹³⁵ the supreme court used plenary power to interpret the Divorce Code.¹³⁶ The court provided guidance to the lower courts concerning the Code and the Legislature's intent in the newly enacted legislation regarding the distribution of property.¹³⁷ The supreme court's guidance provided for prompt and consistent interpretation of the Code for all citizens of the commonwealth involved in divorce proceedings.

*E. Constitutional Rights That Affect a Large Body of People
Would Not Be Addressed Immediately*

Oftentimes, the courts are faced with constitutional challenges that have far-reaching implications for more people than the immediate petitioners. The supreme court has used the King's Bench power to address pressing constitutional issues. For example, the supreme court assumed plenary jurisdiction in *Pittsburgh Corning Corporation v. Bradley*¹³⁸ to determine the most efficient disposition of asbestos cases without unfairly depriving litigants of the opportunity to obtain full and fair adjudication of their rights.¹³⁹ At the time, the Philadelphia court system was third highest in the nation with respect to the number of cases received relating to asbestos.¹⁴⁰ The Philadelphia court system, in an effort to provide efficient and fair hearings to the litigants, issued a court rule calling for a separate court docket with a separately appointed asbestos judge.¹⁴¹ When the cases slowed

132. See *id.* at 931.

133. See *id.* at 930.

134. See *id.* at 936.

135. 445 A.2d 1194 (Pa. 1982).

136. See *id.* at 1195.

137. See *id.* at 1195-98.

138. 453 A.2d 314 (Pa. 1982).

139. See *id.* at 315.

140. At the time of this case, 1,850 cases were pending and an average of 75 a month were being filed. See *id.*

141. See *id.*

due to the jury system, the court of common pleas issued another rule instituting trial by judge.¹⁴² Then, following the completion of the matter, any party could demand a de novo trial by jury.¹⁴³

Pittsburgh Corning, a defendant in the asbestos cases, believed that the procedure violated its constitutional right to a jury trial.¹⁴⁴ The Pennsylvania Supreme Court, however, found that the lower court had provided the option to seek a jury trial after the trial judge had ruled.¹⁴⁵ In the interest of efficiency and justice to all parties, the supreme court affirmed the lower court's procedural regulations, allowing the litigation to proceed in a more efficient manner.¹⁴⁶

In *Jackson v. Hendrick*¹⁴⁷ both parties requested the supreme court to assume plenary jurisdiction and determine the proper standard when judging whether overcrowding of prison inmates amounts to cruel and unusual punishment under the Eighth Amendment to the United States Constitution.¹⁴⁸ The lower courts had consistently held that the best way to deal with the inhumane conditions in prisons was to institute a "one man, one cell" requirement.¹⁴⁹ This rule was not acceptable to the prisoners, who were concerned it would lead to solitary confinement.¹⁵⁰ The taxpayers were not happy with this rule either. For them, it meant either more money would be spent on new prisons or the court would order prisoners released.¹⁵¹ Because of the potential cost and safety issues, the Pennsylvania Supreme Court accepted the case under plenary jurisdiction to provide the acceptable test for the lower courts to use.¹⁵² Once the test was provided, the lower courts and the litigants had the necessary tools to achieve a fair result.¹⁵³

142. *See id.*

143. *See Pittsburgh Corning Corp.*, 453 A.2d at 315.

144. *See id.* at 316.

145. *See id.*

146. *See id.*

147. 503 A.2d 400 (Pa. 1986).

148. *See id.* at 401.

149. *Id.* at 402.

150. *See id.*

151. *See id.*

152. *See Jackson*, 503 A.2d at 401.

153. *See id.*

F. Freedom of the Press Versus an Accused's Trial Rights Could Not Be Timely Addressed

The supreme court accepted plenary jurisdiction in *Commonwealth v. Hayes*¹⁵⁴ to determine whether the rights to free press and fair trial could be balanced. In this case, an elected state official was charged with sexually assaulting and supplying drugs to a seventeen year-old male high school student.¹⁵⁵ The trial court granted the defendant's motion to close the hearing to the public and the press.¹⁵⁶ The Pennsylvania Supreme Court reviewed the case and reminded the lower courts that closure may not be ordered where another available procedural device, such as sequestration, could fully protect the defendant's right.¹⁵⁷ The public had a right to gain access to the criminal proceedings, and the court system would not be adversely affected by implementing those procedural alternatives.¹⁵⁸ If the supreme court had not been able to review this case under plenary jurisdiction, the public's right to observe the trial would have been compromised.¹⁵⁹

G. Errors By Lower Judicial Tribunals Could Not Be Reviewed

Cases have existed in which lower judicial actions left the parties with no right to appeal. In a proceeding where members of the Pittsburgh Police Department were dismissed and the Civil Service Commission had affirmed their dismissal, no statutory jurisdiction was granted to the superior court to entertain an appeal.¹⁶⁰ The Pennsylvania Supreme Court, however, was able to hear the appeal under King's Bench.¹⁶¹ The supreme court explained that King's Bench was a necessary power granted only to it.¹⁶² However, when it took a case under this auspice, it would not "weigh the evidence nor in other respects substitute [its]

154. 414 A.2d 318 (Pa. 1980).

155. *See id.* at 318.

156. *See id.* at 318-19.

157. *See id.* at 327.

158. *See id.*

159. *See Hayes*, 414 A.2d at 327.

160. *See In re* Petition of Bell, 152 A.2d 731 (Pa. 1959).

161. *See id.* at 733.

162. The court stated that "inherent in the Court of King's Bench was the power of general superintendency over inferior tribunals It keeps all inferior jurisdictions within the bounds of their authority." *Id.* at 734.

discretion for that of the court below."¹⁶³ The only exception to this rule would be when the lower court abused its discretion or there was an error of law.¹⁶⁴

The supreme court has also used the King's Bench power to review a lower court's inappropriate behavior in criminal trials. In *Commonwealth v. Chimenti*,¹⁶⁵ the superior court entertained a plea bargain after the entry of a judgment of a sentence.¹⁶⁶ A defendant, who was convicted of first degree murder, was able to obtain a plea bargain agreement of no higher than third degree murder from the superior court judge.¹⁶⁷ The supreme court saw this as an over-extension of authority by the superior court judge; therefore, it vacated the superior court's order and remanded the case for a proper appeal.¹⁶⁸

H. A Sound Criteria for Using the Plenary Jurisdiction Already Exists

The treatise for appellate practice in Pennsylvania¹⁶⁹ has stated that the supreme court has a loose formula or standard whereby cases will be considered for review under the plenary jurisdiction.¹⁷⁰ First, while "[t]he presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief . . . ,"¹⁷¹ it plays a prominent role in the factoring process.¹⁷² As seen in the previous section, election cases, strikes, and education are some of the cases that have often presented the need for swift decisions.¹⁷³ Otherwise, the citizens are without government representation, can be at risk in not being able to

163. *Id.* at 740.

164. *See id.*

165. 507 A.2d 79 (Pa. 1986).

166. *See id.* at 80.

167. *See id.*

168. *See id.* at 83.

169. G. RONALD DARLINGTON ET AL., PENNSYLVANIA APPELLATE PRACTICE §§ 10:22-23 (2d ed. 1994).

170. *See id.*

171. *Philadelphia Newspapers v. Jerome*, 387 A.2d 425, 430 n.11 (Pa. 1978), *appeal dismissed*, 443 U.S. 913 (1979).

172. In *Masloff v. Port Authority of Allegheny County*, 613 A.2d 1186 (Pa. 1992), the "[h]earing demonstrated that the strike created a clear and present danger and a threat to the health, safety, and welfare of its citizens." *Id.* at 1188. "Public services, such as ambulance, fire and police services, were severely hampered by the increased traffic congestion resulting from the strike." *Id.* at 1191.

173. *See supra* discussion Part IV.

receive medical attention, or can be deprived a quality education. The court also has intervened under plenary jurisdiction to help decipher the necessary procedure to elect lower court judges.¹⁷⁴ This action eliminated election day delay and confusion.¹⁷⁵

The court also appears to look for some sort of direct or indirect impact on the judicial system.¹⁷⁶ Often, a constitutional question is involved or a criminal issue of great importance when the power is invoked.¹⁷⁷

Cases that involve issues of constitutionality and the criminal justice system have gone directly to the supreme court for review because prompt and final resolutions were needed. "Where a constitutional question is so momentous that it is bound to go all the way to the supreme court, there is no point in going through intermediate reviews."¹⁷⁸ Interestingly, in those states which do not have an intermediate appellate court, all cases are reviewed directly and solely by the highest court.¹⁷⁹

The Pennsylvania Constitution vested "the judicial power of the Commonwealth in a unified judicial system"¹⁸⁰ and reposes "the supreme judicial power" in the supreme court.¹⁸¹ The framers of the constitution recognized that each branch of government must have a responsible head. Thus, the supreme court has correctly taken direct jurisdiction of issues affecting the court system. The lower courts could not decide some of these issues and, therefore, left the supreme court with no alternative but to decide the case.¹⁸²

174. See *Thiemann v. Allen*, 402 A.2d 1348, 1349 (Pa. 1979), *overruled sub nom. Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983).

175. See *August Hearing*, *supra* note 6, at 100 (testimony of Hon. David Craig, Former President Judge, Pa. Commw. Ct.).

176. See *Commonwealth v. Lutz*, 495 A.2d 928 (Pa. 1985).

177. See *supra* notes 138-59 and accompanying text.

178. See *August Hearing*, *supra* note 6, at 95 (testimony of Hon. David Craig).

179. See Thomas B. Marvell, *The Effectiveness of Flexible Assignments of Appeals between Supreme and Intermediate Courts*, 78 JUDICATURE 292 (1995)

180. PA. CONST. art. V, § 1.

181. *Id.* § 2.

182. See *In re Determination of Priority of Comm'n Among Certain Judges of the Super. Ct. and Commw. Ct.*, 427 A.2d 153 (Pa. 1981) (deciding whether appointive service could be counted in determining seniority among elected judges); *Beckert v. Warren*, 439 A.2d 638 (Pa. 1981) (deciding whether court of common pleas' budgetary request was valid); *Snyder v. Snyder*, 620 A.2d 1133 (Pa. 1993) (deciding whether county court judge required county funds for judicial staff in the administration of justice); *Lavelle v. Koch*, 617 A.2d 319 (Pa. 1992); *Carroll v. Tate*, 274 A.2d 193 (Pa. 1971).

When a party is convinced that the Pennsylvania Supreme Court has decided the case incorrectly, it may appeal to the United States Supreme Court. In fact, this has been done with many of the cases that were decided under plenary jurisdiction; however, the United States Supreme Court has denied every appeal for certiorari.¹⁸³

V. Other States' Judicial Systems—Are They Better?

In ten other states that have intermediate appeals courts, the highest court exercises unconstrained control over every appeal taken from the trial courts or agencies.¹⁸⁴ In six of those states,¹⁸⁵ all appeals are filed with the supreme court. The supreme court then selectively chooses and transfers the remaining cases to the intermediate appellate level.¹⁸⁶ The other four states require the appeal to be filed with the intermediate court.¹⁸⁷ However, the high court still picks the cases it wants to hear and leaves the remaining cases for the intermediate court.¹⁸⁸

Legal scholars believe that neither of these systems effectively uses the highest court's discretion to hear cases.¹⁸⁹ First, lawyers trying cases have no clear guidance as to which cases will be heard. Second, justices have no exact formula to decide what case to accept. Third, the system, at times, does not work as efficiently as need be.

Pennsylvania, however, has the opportunity to hear emergency cases swiftly in its supreme court with consistency in the routing of appeals. Lawyers are given clear instructions¹⁹⁰ on how and where to file petitions for extraordinary relief.¹⁹¹ Once the petition is filed, a lawyer knows where the petition is and waits to learn whether it will be accepted. Then, when the petition is accepted, each lawyer can argue on the merits. Finally, it is noted that parties rarely oppose having the supreme court take plenary

183. See *August Hearing*, *supra* note 6, at 124-25 (testimony of Hon. David Craig).

184. See *Marvell*, *supra* note 179, at 293.

185. The six states are: Hawaii, Idaho, Iowa, Mississippi, South Carolina, and Utah. See *id.*

186. See *id.*

187. The four states are: Connecticut, Kansas, Massachusetts, and Nebraska. See *id.*

188. See *id.*

189. See *August Hearing*, *supra* note 6, at 108-10.

190. See PA. R. APP. P. 3309.

191. See *DARLINGTON*, *supra* note 169, § 3309 (appendix) (providing a sample form).

jurisdiction¹⁹² and often welcome the swiftness and finality of the decision.¹⁹³ Likewise, the clients often see this as a less costly alternative in reaching a final decision that legally binds all parties.¹⁹⁴

VI. Options Available to the Court to Improve Our Current System

The hearings from the House Judiciary Committee provided great insight into the advantages and disadvantages of the King's Bench power. Almost unanimously,¹⁹⁵ both those who seek aggressive judicial reforms and those who are avid guardians of our judicial system agree that a complete dismissal of this power would not be good for Pennsylvania.¹⁹⁶ However, several recommendations could make our system better, more efficient, and perhaps even lessen the opportunity for the public to see the appearance of judicial impropriety.

First, the supreme court should be commended for amending its rules¹⁹⁷ to require the petitions to be filed with the prothonot-

192. See *August Hearing*, *supra* note 6, at 60, 91.

193. See *id.*

194. See *id.*

195. Even the Chester residents involved in *Thermal Pure* testified that there is a need for the King's Bench power. Zulene Mayfield testified that "[i]f there is a case where it's life and death, then I would say that we should have King's Bench." *August Hearing*, *supra* note 6, at 60. Mr. Balter, lawyer for the Concerned Citizens of Chester, stated: "I can appreciate a need for something like the King's Bench. There comes in all societies certain crises in which there is need for quick decision making. Therefore I don't have an objection philosophically." *Id.* at 91.

196. "If the problem is not so much the existence of the power as its application in a few unfortunate instances, then perhaps the problem would be better addressed in other ways." *March Hearing*, *supra* note 5, at 91 (testimony of Hon. Robert L. Byer for the American Judicature Society).

"[T]he Legislature should keep foremost in mind the traditional constitutional balance of power between the branches of government [T]here is a fine line between fixing the perceived ills of the judiciary and usurping its constitutional role. Quick fixes . . . are not recommended." *Id.* at 10 (testimony of Paul L. Stevens, Esq., President, Pa. Bar Ass'n).

197. The supreme court in 1994 promulgated internal operating procedures which require petitions, including petitions for extraordinary relief under the King's Bench power, to originate in the prothonotary's office. See PENNSYLVANIA RULES OF COURT, *Internal Operating Procedures of the Supreme Court*, 662 (West 1997) (Motions, Miscellaneous Petitions and Applications for Relief).

The Pennsylvania Rules of Appellate Procedure provide a five paragraph rule on how one is to file a petition for extraordinary jurisdiction, the right of the opponent or those interested in filing an answer, the requirement of service upon interested parties, provisions for the circulation of the petitions through the entire court, and vote. See PA. R. APP. P. 3309.

ary's office and not with the individual justices.¹⁹⁸ The ability to petition an individual justice was of great concern during the Larsen hearing.¹⁹⁹ This new rule will assist the court in establishing credibility with the public.

Second, upon accepting a case under King's Bench, the supreme court should attempt not to act as a fact finder. In the event it does act as a fact finder, however, the supreme court should produce some type of trial record. This is a matter of deep concern to the opponents in *Thermal Pure*.²⁰⁰

Third, many have advocated for a more definite time frame for the court to issue an opinion under plenary jurisdiction.²⁰¹ Again, this issue was a concern to the Impeachment Committee and to those residents of Chester living with potentially unsafe conditions.²⁰² In *Thermal Pure*, the Pennsylvania Supreme Court heard argument in April 1995²⁰³ and seven months later a decision was finally handed down.²⁰⁴ Some people presenting testimony to the House Judiciary Committee suggested that the time it took the supreme court to issue an opinion in the *Thermal Pure*²⁰⁵ case is not that important, because the case normally would not have reached the supreme court in such a quick fashion.²⁰⁶ Therefore, to have the ultimate decision in the case take a few months longer

198. Court rules were amended by the supreme court as a result of the impeachment trial. See Pamela Sampson, *State's Top Court to Improve Procedures—Recent Changes Focus on Justice's Accountability*, PATRIOT-NEWS (Harrisburg), Oct. 13, 1994, at A1.

199. See *Impeachment Trial*, *supra* note 3, at 2156-66, 2173, 2183-84, 2260-61.

200. "Imagine further that there is no transcript and there is no appeal if the Supreme Court rules against you." Piccola, *supra* note 7, at A15; see also *August Hearing*, *supra* note 6, at 84 (testimony of Jerome Balter, Esq.).

201. See *August Hearing*, *supra* note 6, at 19-24; see also *Impeachment Trial*, *supra* note 3, at 2192-93.

202. See *August Hearing*, *supra* note 6, at 42-94 (testimony of Zulene Mayfield and Jerome Balter, Esq.).

203. See *id.* at 70.

204. An opinion for the appeal heard under allocatur was issued on November 22, 1995. In a footnote to the opinion, the supreme court acknowledged it had not yet taken action under its plenary jurisdiction to decide the validity of DER's Cease and Desist Order. However, this opinion made that decision moot. Chester Residents Concerned for Quality Living v. Commonwealth, 668 A.2d 110 (Pa. 1995) (appeal of *Thermal Pure*). See also *Court OKs Treatment Plant*, SENTINEL (Carlisle), Nov. 24, 1995, at A2; *Ruling Clears Way for Treatment Plant*, TIMES (Reading), Nov. 24, 1995, at B7.

205. *Thermal Pure v. DER*, 63 E.D. Misc. Dkt. 1995 (Pa.). See also Chester Residents Concerned for Quality Living v. DER, 668 A.2d 110 (Pa. 1995).

206. See *August Hearing*, *supra* note 6, at 20 (testimony of Zygmont Pines).

than either side would like is really not an issue.²⁰⁷ Nonetheless, the court should review its system to determine whether it can more efficiently write opinions and resolve issues for the public. After all, matters taken under this power are supposedly emergency in nature.

Fourth, the supreme court, while having the prerogative to overturn any lower court's decision, should consider instituting a policy regarding injunctions issued by a lower court or agency. When a watch dog agency, such as the Department of Environmental Protection, has issued a Cease and Desist Order, as they did in *Thermal Pure*,²⁰⁸ the health and well-being of our residents must be upheld.²⁰⁹ When a decision is not to be forthcoming, then the court should respect the lower court's findings until a final decision is handed down.

Fifth, rules are needed concerning former supreme court justices lobbying before the court on behalf of their clients.²¹⁰

207. It should be noted that the court already has internal rules regarding time frames for hearing cases. Rule VI(B) states:

Disposition. The Chief Justice will prepare memorandum[a] setting forth the position[s] of the parties and a recommended disposition. Vote proposals shall be circulated within [thirty] days from the date of [the] assignment, and shall contain a proposed disposition date no greater than [thirty] days from the date of circulation. A vote of [the] majority of those participating is required to implement the proposed disposition.

Every motion shall be decided within [sixty] days. Orders disposing of motions shall include the names of any justices who did not participate in the consideration or decision of the matter. Procedural motions, e.g., requests for extension of time, requests to exceed page limits and to proceed in forma pauperis, are to be disposed of by the prothonotary's office after screening by the deputy prothonotary.

August Hearing, *supra* note 6, at 40-41; see also PENNSYLVANIA RULES OF COURT, *Internal Operating Procedures of the Supreme Court*, 662 (West 1997) (Motions, Miscellaneous Petitions and Applications for Relief)

Zygmunt Pines believes that the Pennsylvania Supreme Court met the requirements of this rule in *Thermal Pure*. The petition for plenary review was filed in March and the court granted the petition in April, within 30 days. See *id.* at 41. The rules do not appear to dictate a time limit on the court providing a final opinion on the matter, however.

208. *Thermal Pure v. DER*, 63 E.D. Misc. Dkt. 1995 (Pa.). See also *Chester Residents*, 668 A.2d at 110.

209. Mr. Balter believes that if the court had overruled the commonwealth court's decision, the result would have been acceptable and "normal" under King's Bench. However, he believes overruling an administrative agency's determination without a hearing is stretching the power and, therefore, unacceptable. See *August Hearing*, *supra* note 6, at 94.

210. The lawyer for the company in *Thermal Pure*, Mr. Kauffman, is a former Pennsylvania Supreme Court Justice. Rumors circulated that the reason the supreme court accepted this case was because this former justice made personal contact with some of his

This rule could be similar to the United States Supreme Court's rule, which prohibits "any person after leaving employment [of the Court from] participat[ing] in any professional capacity in any case pending before th[e] Court . . . until two years have elapsed after separation."²¹¹ The other option is for the Pennsylvania Supreme Court to adopt additional ethics rules like the Legislature has imposed on itself.²¹²

Sixth, it has been recommended that the supreme court should not interfere with an agency decision until it is in the court system.²¹³ However, this would conflict with the Beck and Pomeroy Commission reports, which recommended that the supreme court have jurisdiction over agency tribunals as well to make for a unified judicial system.²¹⁴

Finally, the Legislature, if it truly wants to help improve the supreme court and the appearance of our justices, must seriously consider adopting a merit based system for choosing justices. Then, in the confirmation process, the Legislature could make sure that nominees have a thorough understanding of the boundaries of the supreme court and the use of the King's Bench power. Many advocates, testifying both for and against King's Bench, recognize the inherent fault of this system in the election process.²¹⁵

VI. Conclusion

The Legislature's belief that the language found in House Bills 10 and 838 will restore the public's faith in the judicial system is

former colleagues on the bench. Mr. Kauffman has denied these rumors. See *August Hearing*, *supra* note 6, at 81.

211. U.S. SUP. CT. R. 7.

212. See 65 PA. CONS. STAT. ANN. § 403 (1997) (restricted activities for public officers). Subsection (g) states that "[n]o former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body." *Id.*

213. Jon LaFaver testified before the House Judiciary Committee that "it would be possible to restrict the power of the Supreme Court to issue writs of prohibition, which was one of the King's Bench power, to say only constitutionally created courts, and thereby eliminating the exercise of that power from other commissions and quasi-judicial bodies, without eliminating entirely the other historical powers of King's Bench." *March Hearing*, *supra* note 5, at 28.

214. See PHYLLIS BECK, REPORT OF THE GOVERNOR'S JUDICIAL REFORM COMMISSION (1988).

215. "If we make major improvements in the way we select our judges, the need for other reforms probably diminishes." *March Hearing*, *supra* note 5, at 186 (testimony of Barry Kauffman, Executive Director of Common Cause/PA); see also *supra* notes 19, 61, 65 and accompanying text.

incorrect. In fact, if King's Bench is eliminated, the Pennsylvania court system will not be able to efficiently address matters of urgency.²¹⁶ Many have warned the legislators against "throw[ing] the baby out with the bath water."²¹⁷ This phrase sums up what could be the ultimate effect in our judicial system if passage of the legislation ensues.²¹⁸ Removal of this power will prevent cases important to Pennsylvania citizens from being heard expeditiously, perhaps from ever being heard at all. The interference by the Legislature into the judicial branch's handling of justice likely will be considered unconstitutional by the supreme court²¹⁹ and a constitutional amendment must be passed in order for the court to accept the Legislature's instructions.²²⁰

The Legislature and the people of Pennsylvania should not attempt to fix what is not broken. This power has existed for more than two hundred years and has provided efficient and necessary judicial review at crucial times in the state's history. It has provided necessary relief to the citizenry. There are no complaints from the legal profession concerning the use of the power, except perhaps from the losing side.

While the supreme court can amend its rules to make for a more clear and efficient power, the best thing the Legislature can do to help create a better judicial system is to move toward the

216. Judge Spaeth testified:

The problem with the judicial system in the public's eyes is that appellate judges are selected only after a process that demeans the system, discourages confidence in it. It's mired and money raising from those who practice before the Court. These bills would do nothing about that. That's the root of judicial reform.

March Hearing, supra note 5, at 57.

217. *August Hearing, supra* note 6, at 95 (testimony of Hon. David Craig).

218. Mr. Ronca, in his testimony before the House Judiciary Committee, stated the following:

Our concern, I think, is that in reaction to what happened to the Supreme Court over the past few years, the legislature might overreact in trying to control, or amend or lessen the powers of the judicial branch, which could have one of two effects. It could lessen the effectiveness of the Supreme Court to act as the arbitrator for what is constitutional and what is not unconstitutional. And it also could create a constitutional crisis, I think, wherever the Court may try to exercise powers that aren't there. I think we have to look beyond what has happened in the past few years and try to also keep an eye toward what the Supreme Court might be trying to do in the future years . . . [W]ith respect to the King's Bench, there are times when that suspension or the exercise of those powers is very useful and very proper.

March Hearing, supra note 5, at 78.

219. See discussion *supra* Part II.A.

220. See PA. CONST. art. XI, § 1.

merit selection of judges. The people of the commonwealth, meanwhile, need to become better informed as to the candidates for the supreme court seats. A hasty move by the Legislature or the public at this juncture could ultimately backfire when the citizens of the commonwealth need access to the court the most.

Alexandra Makosky

